IN THE

SUPREME COURT OF THE UNITED STATES

MAR 20 1975

MICHAEL RODAK, JR., CLERK

October Term, 1974

No. 74-961

PHOEBE WILSON DILLON, Petitioner,

-vs-

ANTLER LAND COMPANY of Wyola, a Montana Corporation; LITTLE HORN LAND COMPANY, a Montana Corporation, ANTLER LAND COMPANY, A Montana Corporation, LITTLE HORN LAND AND LIVESTOCK COMPANY, a Montana Corporation; UNION BANK AND TRUST COMPANY, Executor of the Estate of BERTHA TSCHIRGI; REX HIBBS, Executor of the Estate of F. M. TSCHIRGI; FRANCIS J. MURTHA, as Trustee for TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREA PENSION FUND; and the UNITED STATES OF AMERICA,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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RESPONDENTS' ARGUMENTS IN OPPOSITION

In their Brief in Opposition to this Court's granting of Petitioner's Petition for Writ of Certiorari, the non-governmental Respondents press four points:

First:

With the issuance of a fee patent, Petitioner's land became subject to state law perforce of Section 1 of The Crow Act of 1920 and 25 U.S.C. 349 (Brief in Opposition, pp. 5; 6-9; 10-16 26).

Second:

The cases relied upon by Petitioner as establishing precedent contrary to that of the Ninth Circuit's decision do not involve the controlling facts of this case or the same granting Indian legislation (Brief in Opposition, p. 24).

Third:

Petitioner cannot collaterally attack the validity of her fee patent (Brief in Opposition, pp. 5; 9; 20; 21 & 25);

Fourth:

Mandamus does not lie against the United States to compel It, in a direct action, to set the fee patent aside (Brief in Opposition, pp. 5; 9; 20; 21 & 26).

REPLY ARGUMENT

I.

RESPONDENTS' PRINCIPAL ARGUMENT IS NON-RESPONSIVE TO THE QUESTION CURRENTLY BEFORE THE COURT AND WHOLLY IGNORES THE CRITICAL ISSUE IN THIS CASE

Respondents' first argument really goes to the merits of this case and does not address the reasons why the Writ should not be granted. Simply put, the conclusion which follows from their confusing discussion of legislative history is that Section 1 of the Crow Act of June 4, 1920 (41 Stat. 695) incorporates by reference Section 6 of the General Allotment Act of Febrary 8, 1887 (24 Stat. 388) [now 25 U.S.C. 349]; therefore, once a fee patent is issued, perforce of Section 349, the government trust is extinguished and the allottee and his land are

subject to state law.

Petitioner agrees with this observation and further asks, "So What?" The critical question wholly ignored by Respondents' Brief is whether the restriction of Section 2 of the Crow Act on the sale of Crow lands patented in fee pursuant to Section 1 commands a different result.

The thrust of Petitioner's argument why this Court should grant Certiorari is that both lower courts likewise ducked the difficult issue raised by the juxtaposition of Section 2 and 25 U.S.C. 349, as incorporated by Section 1. Their myopia lies in concluding that a fee patent having issued Petitioner for her land, Section 349 compels recognition that Montana statutes of limitations and laws of adverse possession apply to vest title in the Respondents, notwithstanding Section 2's clear declaration that such conveyance of the

land to these large non-Indian landowners is absolutely void!

As argued in the Petition for Writ of Certiorari, this conclusion is clearly contrary to Ewert v. Bluejacket, 259 U.S. 129 (1922), wherein this Court held that federal prohibitions against the alienation of Indian lands to non-Indians are supreme, so that state limitations on actions for recovery of land "cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions." 259 U.S. at 137-138. It is also contrary to the decisions of the Seventh and Tenth Circuits which have held that state statutes of limitations cannot apply to bar actions brought to recover restricted fee land, the necessary implication being that federal trust responsibilities have not been fully extinguished. United States v. Schwarz, 460 F. 2d

1365 (7th Cir. 1972); Garcia v. United States, 43 F. 2d 873 (10th Cir. 1930). As is readily apparent, the decision of the Ninth Circuit is anomolous so as to warrant invoking the supervisory jurisdiction of this Court.

II.

RESPONDENTS HAVE SIMPLY MISREAD THE CASES RELIED UPON BY PETITIONER

Respondents' second swat at the first argument raised in the Petition for Certiorari is that the cases cited do not rest upon facts or legal conditions analogous to those at bar. They contend first, that the cases involve tribes "expressly excepted from the provisions of 25 U.S.C. 349 -- Cherokees, Creeks; Choctaws; Chickasaws; Seminoles; Osage; Miamies; Peorias; Sacs and Foxes; Seneca Nation plus the Five Civilized Tribes in

Oklahoma...." Brief in Opposition, p. 24. The "Five Civilized Tribes" are the first five bands of Indians referred to.

Contrary to Respondents' assertions, none of the cases cited wherein state statutes of limitation were refused application involved tribes exempt from Section 349: Ewert v. Bluejacket, supra, p. 4, dealt with a Quapaw; United States v. Schwarz, supra, p. 4-5, involved a Chippewa; and, Garcia v. United States, supra, p. 5 concerned lands sold by a member of the Pueblo Tribe.

They further contend that each case "involves the legal validity of conveyances by noncompetent Indians before a patent in fee issued, and while legal title still vested in the United States in trust for noncompetent Indian Allottee." Brief in Opposition, p. 24. To the contrary, in both Schwarz and Garcia the lands sought to be recovered from the

non-Indian grantee had been held by the Indian by patent-in-fee. The lands in Ewert, while not held by fee patent, had passed to the non-Indian grantee pursuant to a statute providing for conveyance of inherited lands "free from restrictions" when approved by the Secretary of Interior, the legal effect being "the same as if a final patent without restriction upon the alientation had been issued to the allottee." Act of May 27, 1902, c. 888 (32 Stat. 275) [now, 25 U.S.C. 379]. 25 U.S.C. 347 further directs that state statutes of limitation are applicable to actions brought to recover lands so approved.

In all cases cited, therefore, just as in the case at bar, legal title apparently passed to the non-Indian grantee thereby subjecting any action brought to recover the land to state statutes of limitation. Ewert

determined, however, that where a conveyance of Indian land to a non-Indian grantee is absolutely prohibited by federal statute, state laws limiting the time within which the grantor or his heirs can bring an action to recover the land have no application, because the effect would be to perfect a conveyance absolutely void under an Act of Congress.

Schwarz and Garcia, while reaching the same result, proceed upon a different theory. They hold that notwithstanding issuance of a fee patent, a statutory condition subsequent restricting alienation of the fee carries with it the necessary implication that the lands are still restricted lands over which federal trust responsibilities have not been fully extinguished. Consequently, the courts in both cases found that adverse possession under a state statute of limitations

could not run to perfect a conveyance of land not so alienable by the Indian.

Section 2's prohibition against alienation of Petitioner's land to the Respondent non-Indian landowners places this case, both factually and legally, on all fours with Ewert, Schwarz, and Garcia. The decisions relied upon by Respondents, Dickson v. Luck Land Co., 242 U.S. 371 (1917), United States v. Waller, 243 U.S. 452 (1917) and Larkin v. Paugh, 276 U.S. 431 (1928), all concern the applicability of state law under 25 U.S.C. 349 where the fee patent is not otherwise restricted, and, therefore, have no applicability to the controlling facts of this case. The only other case relied upon by Respondents, United States v. Powers, 305 U.S. 527 (1939), apart from involving lands on the Crow Reservation and some of the same Respondents as are named in

this suit, is totally irrelevant. That case concerned neither the applicability of state law to Crow fee lands nor construction of 25 U.S.C. 349, Section 1 or Section 2 of the Crow Allotment Act.

This Court should, therefore, grant Certiorari because Section 2 of the Crow Act has never before been construed by this Court, and because the decision of the Ninth Circuit is not consistent with applicable decisions of the Court and other Circuits.

III.

A FEE PATENT PROCURED THROUGH FRAUD PRACTICED BY THE WHITE MAN IS COLLATERALLY ASSAILABLE BY THE INDIAN PATENTEE

Here, again, Respondents neglect to meet head-on the reasons for granting the Writ presented in Argument II of the Petition for Writ of Certiorari. Instead, they have

slipped-off to a side issue arguing that Petitioner cannot collaterally attack the validity of the fee patent which was issued her.

It is generally posited that a patent issued an individual on public lands is unassailable, except by the United States in a direct action to cancel the instrument. With the exception of Moore v. Robbins, 96 U.S. (6 Otto) 848 (1878), the cases cited on page 20 of Respondents' brief generally support this proposition.

However, whereas here, a patent's validity is assailed on the basis of fraud practiced in securing its procurement, this Court has repeatedly recognized an exception to the general rule and upheld the maintainability of a collateral attack. The doctrine that a court of equity will entertain actions between

private individuals to set aside patents for fraud or mistake was fully reviewed and announced in Johnson v. Towsley, 80 U.S. (13 Wall.) 485 (1871). Since, the doctrine has been restated and reaffirmed in Shepley v. Cowan, 91 U.S. (23 Wall.) 424 (1875) and Moore v. Robbins, supra, dealing with public lands generally, and Ross v. Stewart, 227 U.S. 530 (1912), concerning patents issued on Indian lands, in particular.

Notwithstanding repeated assertions by the Respondents that the patent received by Petitioner is valid (Brief in Opposition, pp. 5, 6, 10, 20) both lower courts held there to be a trible issue as to whether its issuance was procured through fraud. They further held, however, that applicable state statutes of limitation bar any right to relief. As contended in the Petition for

Writ of Certiorari, the decision of the Ninth Circuit is in conflict with that of the Eighth and not consistent with a prior District Court decision in Montana.

IV.

THE ISSUE OF WHETHER OR NOT MANDAMUS LIES AGAINST THE UNITED STATES TO COMPEL IT TO SET A FEE PATENT ASIDE IS TOTALLY IRRELEVANT TO THE ISSUES FRAMED BY THE PLEADINGS

The Complaint does not state a claim for relief in the nature of mandamus. (Record, pp. 1 - 13).

What Petitioner seeks against the United States is an adjudication that It is liable in damages pursuant to the Federal Tort Claims Act for failure to take action on Petitioner's behalf to set aside the deed given Antler Land Company. (Record, pp. 6-8).

Both lower courts found the duty of the United States, if any, to be discretionary and not mandatory and, therefore, concluded that the Federal Tort Claims Act does not apply. (Record at 574); (Opinion of United States Court of Appeals for the Ninth Circuit, Appendix A to the Petition for Writ of Certiorari, pp. 11a-12a.) The propriety of this decision is the question brought before this Court in Argument III of the Petition for Writ of Certiorari.

A subsidiary issue attending this third question, is whether the lower court committed fatal error when it granted summary judgment in favor of the United States on Petitioner's Second Calaim for relief sua sponte without a motion, without notice to Petitoner, and without a reasonable opportunity to present material pertinent thereto as required by Rule 12(b).

(See Appendix D, p. 2d to the Petition for Writ of Certiorari). While the fourth defense of the Answer of the United States to the Complaint states as a defense that, "the Complaint fails to state a claim upon which relief can be granted against the United States", this defense was never placed in the form of a motion to dismiss. Consequently, the lower court's granting of summary judgment on Count Two of the Complaint took Petitioner by surprise when the matter was ruled upon without notice, without an opportunity to submit affidavits or other matters in support of the claim and without an opportunity to brief the subject or present oral argument at the hearing.

The rule that parties must be given adequate notice and an opportunity to present all material facts when a Rule 12(b) motion

is converted into one for summary judgment is so well established in the Ninth Circuit, itself, as to warrant summary reversal of the appellate court's opinion on this issue, alone, See, Erlich v. Glasner, 374 F. 2d 681 (9th Cir. 1967); Costen v. Pauline's Sports Wear, 391 F. 2d 81 (9th Cir. 1968).

CONCLUSION

As a familiar rule, legislation affecting Indians is to be construed in their interest. As a consequence, perhaps, where Congress has itself legislated restrictions on the sale and disposition of Indian fee lands, courts have refused application of state statutes of limitation and laws of adverse possession where the effect would be to perfect conveyances prohibited by federal law. Similarly, where rights have been

acquired in Indian lands by an unlawful or fraudulent act, the courts have been loathe to estop the Indian grantor or his heirs from maintaining an action for their recovery.

Title to thousands of acres of Crow fee lands deeded over the years to large non-Indian landowners in spite of the clear prohibition of Section 2 of the Crow Allotment Act of June 4, 1920, depends on the ultimate disposition of this case. The prayed for Writ should, accordingly, be granted to review the consistency of the Ninth Circuit's opinion with the above principles announced by this Court and other circuits and to decide, with finality, the important question of Federal Indian Law raised by Section 2 of the

Act of June 4, 1920, never heretofore construed by this Court.

Respectfully submitted,

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By, WILLIAM L. MADDEN, JR.
Member of the Firm
(On the Petitioner's Reply Brief in Support of Petition For a Writ of Certiorari)

DATED this_____day of March, 1975.

AFFIDAVIT OF PROOF OF SERVICE

STATE OF MONTANA)
County of Yellowstone) ss.

I, WILLIAM L. MADDEN, JR., an attorney duly authorized to practice law in the state of Montana and the Courts of the United States of America, and member of the firm of Towe, Neely & Ball, 2525 Sixth Avenue North, Billings, Montana, attorneys of record for PHOEBE WILSON DILLON, Petitioner herein, depose and say that on the _____ day of March, 1975, I served a copy of the foregoing REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit on the several parties thereto, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, First Class, postage prepaid, to:

Mr. Otis L. Packwood
United States Attorney
District of Montana
Federal Building
Billings, Montana 59101

2. On the United States, by mailing copies in a duly addressed envelope, with Air Mail postage prepaid, to:

THE SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
Washington, D. C. 20530

Mr. Kent Frizzel
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

Messrs. George R. Hyde and
Glen R. Goodsell, Attorneys
Department of Justice
Washington, D. C. 20530

3. On the non-government Respondents herein, by mailing copies in a duly addressed envelope with First Class postage prepaid, to their respective attorneys of record at their following addresses:

Rex F. Hibbs
Hibbs, Sweeney & Colberg
Mutual Benefit Life Building
Billings, Montana 59101; and

Cale Crowley
Crowley, Kilbourne, Haughey,
Hanson & Gallagher
500 Electric Building
P. O. Box 2529
Billings, Montana 59103.

WILLIAM L. MADDEN, JR.

SUBSCRIBED AND SWORN TO before me this

_____day of March, 1975.

_____
Notary Public for the State of Montana
(SEAL) Residing at Billings, Montana
My Commission Expires 1/6/78